Town of Brookline
Massachusetts

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Patrick J. Ward, Secretary

DECISION

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. BOA 070031

Appellant Robert M. Franklin of 145 Lagrange Street appealed the issuance of building permit BL 07 00284 to Ralph Feinberg, the owner/developer of property located at 135 Lagrange Street (the "Property"). This building permit was issued on or about March 13, 2007 and Mr. Franklin's appeal was timely filed with the Town Clerk on April 12, 2007. Mr. Feinberg (the "Developer") is constructing a single-family home on the Property and Mr. Franklin resides in a single-family home abutting the southwest border of the Property. Members of the Board sitting for this appeal were Enid Starr as chair, Murray Shocket and Jesse Geller. Mr. Franklin represented himself and was assisted by attorney Steven E. Bauman at one hearing. The Developer was represented by attorney Jacob Walters.

Background

The Developer originally purchased the Property in 2003. At that time it was a portion of property with an address of 79 Princeton Road that contained a single-family home with a tennis court. The area is in an S-15 zoning district. According to the Town of Brookline Zoning Bylaw (the "Zoning Bylaw"), §5.00, Table 5.01, the minimum lot size in this district in 15,000 s.f., the floor area ratio (FAR) maximum is 0.25, the minimum lot width is 100 feet and the maximum building height is 35 feet. The Developer, who wanted to subdivide the property and create a buildable lot, designed a two-lot plan. One lot included the original home (the "79 Princeton Road lot") and the other was the Property in question and the location of the former tennis court. In order to construct a single-family home on the Property, the Developer needed relief from the lot width requirements of the Zoning Bylaw. Such relief was granted by Special Permit

pursuant to Bylaw §5.15.2. The Special Permit decision was filed with the Town Clerk on April 14, 2004. On May 5, 2004, the Town Clerk certified that 20 days had elapsed and no appeal was taken, and the decision was filed with the Norfolk District of the Land Court on May 10, 2004.

The Special Permit was granted subject to the following three conditions:

1. The new house at 135 Lagrange Street shall conform to all dimensional zoning requirements.
2. The site, massing and general appearance of the new house at 135 Lagrange Street shall be submitted for review and approval by the Planning Board prior to the issuance of a building permit.
3. Site access and house location be arranged and designed in such a manner as to provide for an appropriate turnaround to allow vehicles exiting the property to face towards Lagrange Street.

Special Permit Decision, Board of Appeals Case No. 040006, pages 5-6. On May 5, 2004, the Planning Board approved the subdivision plan pursuant to G.L. c.41, 81P.

By deed dated February 2, 2005 and filed with the Norfolk District of the Land Court on February 4, 2005, the Developer conveyed the Property to Terrence O'Reilly. By a deed filed with the Norfolk District of the Land Court on May 2, 2005, the Developer conveyed the 79 Princeton Road lot to Steven and Rachel Fisch. On May 19, 2005, Mr. O'Reilly appeared before the Planning Board in accordance with the conditions of the Special Permit. The Planning Board approved his design and on August 25, 2005, the Building Commissioner issued him a permit to construct a single-family home. By deed dated January 25, 2006 and filed with the Norfolk District of the Land Court on March 23, 2006, Mr. O'Reilly conveyed the property to Gabriel Avram and Paula Bamford. On February 22, 2006, the Building Commissioner transferred the building permit to Mr. Avram to construct a home pursuant to the same plans that were submitted to the Building Commissioner for the August 25, 2006 permit. Mr. Avram appeared before the Planning Board at its May 11, 2006 meeting to present changes to the building plans, and submitted revised building plans to the Planning Board on May 17, 2006. By deed dated November 6, 2006 and filed on November 10, 2006, Mr. Avram and Ms. Bamford conveyed the Property back to the Developer. The Developer sought to make changes to the design of the home and, after submitting the Plan to the Planning Board at its January 27, 2007 meeting and receiving its approval, obtained a new building permit on March 14, 2007.

Prior Appeals

This is the third zoning appeal taken by Mr. Franklin related to the building of the home on the Property.[1],[2] On or about March 14, 2006, Mr. Franklin appealed Building

[1] Mr. Franklin has also filed an appeal to the Massachusetts Board of Building Regulation and Standards (the "BBRS"). He has appealed the ruling of that Board to Suffolk Superior Court. That case is still pending.

Permit BL 06 00263 issued to Mr. Avram, which alleged that the height of the proposed residence was greater than was approved by the Planning Board and that floor area ratio calculations were inaccurate. This appeal was assigned Board of Appeals No 060019 (first permit appeal) and a hearing was noticed for May 18, 2006. By letter dated May 13, 2006, developer-Avram filed a motion to dismiss, alleging that the permit to him on February 22, 2006 was a transfer permit and that the time to appeal the permit lapsed 30 days from August 25, 2005, the date of the issuance of the original building permit.

At the request of the Board, the Office of Town Counsel issued an opinion on May 17, 2006. Town Counsel found that there had been no changes to the permit, save the name of the permit holder and the permit number, and that the time to challenge the substance of the building permit had lapsed in September 2005. Town Counsel, however, did opine that the Board could consider whether the transfer to Mr. Avram was proper. The opinion was silent as to whether the transfer raised any zoning issues within the Board's jurisdiction.

By letter dated May 18, 2006, Mr. Franklin filed his response to the Motion to Dismiss and to Town Counsel's Memorandum. With regard to the Motion to Dismiss, Mr. Franklin argued that the so-called transfer permit was no different from a standard building permit, that the applications for the two permits were the same, and that the Bylaw, Zoning Act and Building Code provide no authority to issue a "transfer permit" as opposed to a "standard building permit." With regard to the opinion of Town Counsel, Mr. Franklin disagreed that the scope of his appeal was limited to issues of the transfer of the permit. Mr. Franklin in his letter further argued that the Board did not have jurisdiction to determine whether the February 22, 2006 permit was a transfer permit or a standard building permit and that the Massachusetts Board of Building Regulations and Standards had exclusive jurisdiction over this issue. He also argued that pursuant to 780 CMR 111.8, the building permit had been abandoned. Mr. Franklin filed a Motion to Stay the proceedings, including a stay on issuing a decision on the Developers Motion to Dismiss, pending a determination of the State Board of Building Regulations and Standards on various building code issues.[3]

At the May 18th hearing, Board member Enid Starr made a conflict of interest disclosure, pursuant to G.L. c. 268A. As a result, Mr. Franklin objected to Ms. Starr sitting on the Board for his appeal. Mindful of the importance the parties' faith in the tribunal, Ms. Starr recused herself and the Board no longer had a quorum. The hearing was continued at the request of both parties to the case. Nevertheless, at the hearing Mr. Franklin explained to the Board that he had submitted a request for zoning enforcement. The Building Commissioner denied the request, and Mr. Franklin represented that he intended to appeal this denial to the Board. The Board agreed that, regardless of whether

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[2] In the two earlier zoning appeals, Mr. Franklin's wife, Ann Wulsin, was also an appellant. In this appeal, Mr. Franklin is the sole appellant.

[3] In addition, at the May 18, 2006 hearing Mr. Franklin filed the following other papers: "Appellants Application to the Zoning Board of Appeals to Subpoena Certain Witnesses and If Necessary, to Postpone Hearing a Reasonable Amount of Time" and "Appellants Motion for All Witnesses to Be Sworn by the Zoning Board of Appeals."

or not Mr. Franklin could raise his zoning claims in his appeal of the so-called transfer permit, he could raise these claims in a zoning enforcement appeal. Accordingly, the Board, without ruling on the Motion to Dismiss or the Motion to Stay, postponed the hearing. Subsequently, Mr. Franklin waived his objection to Ms. Starr sitting on these matters.

Mr. Franklin filed his second appeal, Board of Appeals Case No. 060039, with the Town Clerk on May 25, 2006 (the "enforcement appeal"). That appeal was to the Building Commissioner's refusal to remedy the following zoning violations at the Property alleged by Mr. Franklin in a request for zoning enforcement dated March 29, 2006[4]:

1. The building plan is contrary to the Special Permit Condition 2 because it is not the plan approved by the Town of Brookline Planning Board. The project violates Special Permit Condition 2 because the structure is higher than what was approved by the Planning Board.

2. Special Permit Condition 2 violated Franklin and Wulsin's due process rights because it was a conditional decision that provided discretion to the Town of Brookline Planning Board with regard to certain aspects of the project.

3. The Special Permit lapsed.

4. The plans for the home violated floor area ratio (FAR) requirements of the Zoning Bylaw.

5. The lot does not meet the minimum 15,000 s.f. lot area requirement of the Zoning Bylaw because a pond exists over a portion of the lot and, pursuant to §2.12.5 of the Zoning Bylaw, that portion of any water area more than 10 feet from the shoreline must be excluded from the calculation of lot area.

By letter dated April 27, 2006, the Building Commissioner denied Mr. Franklin's request for enforcement. On May 25, 2006, Mr. Franklin filed his appeal to the Board, which alleged, in addition to the claims listed above, a claim of infectious invalidity.

A duly-noticed hearing on both of Mr. Franklin's appeals was held on June 22, 2006. With regard to the first permit appeal, Mr. Franklin again filed a Motion to Stay any ruling on the case pending a decision by the BBRS.[5] The Board entered into an agreement with Mr. Franklin to extend the time limits for the Board to hear that case and issue its decision "until [the BBRS appeal] is finally resolved, but no later than

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[4] Mr. Franklin's appeal, a 12-page, single-spaced document, also presented claims of violations of the Town Stormwater Management Bylaw, §8.25 of the Town of Brookline General Bylaw. The list presented here includes only the Mr. Franklin's zoning claims filed in the enforcement appeal.

[5] The Motion to Stay is dated June 23, 2006. However, the Board and its Counsel were presented with the Motion at the June 22 2006 hearing.

September 14, 2006." As required by G.L. c. 40A, §15, a copy of the agreement was filed with the Town Clerk. Mr. Franklin at this time raised the issue of what would happen if the BBRS has not issued a decision by the September 14 deadline. Mr. Franklin represented that he would seek an additional stay of the appeal if that were to occur.

At the hearing, Mr. Gabriel Avram, the co-owner of the Property at that time, appeared without legal counsel and requested a continuance of the case so that he could obtain legal counsel. Mr. Avram was previously represented by counsel. Given the complexities of the case, the Board did not believe it was prudent to conduct the hearing without Mr. Avram having counsel. The Board also believed that a new attorney would need two to three weeks to prepare for the case. Given this and to accommodate the vacation schedules of the parties, their attorneys and the Board, the next available date for hearing was August 24, 2004. Mr. Franklin agreed to the date.

Two days before the August 24, 2006 hearing, the Board was notified that one of its members was ill and would not be able to attend. The parties were notified and asked if they would be available for an August 31, 2006 hearing. This date was not convenient for Mr. Franklin, and he requested a later date. The Board's counsel informed Mr. Franklin's attorney, Michael Field, that the Board would be able to accommodate this request provided Mr. Franklin would enter into an agreement that would allow it to hold the hearing and issue its decision past the 100-day deadline imposed by G.L. c.40A, §15. The Board's position is that Mr. Franklin agreed to provide the written extension. Mr. Franklin's position is that he never agreed to this. Nevertheless, the following week when the Board's counsel sought to memorialize the agreement, Mr. Franklin refused to provide it. In the meantime, the Board noticed a hearing on both appeals for October 5, 2007.

On or about September 11, 2006, Mr. Franklin requested constructive approval from the Town Clerk pursuant to G.L. c.40A, §15 in his enforcement appeal (Board of Appeals Case No. 060039). On or about September 27, 2006, Mr. Franklin requested constructive appeal on his first permit appeal (Board of Appeals Case No. 0600019).[6] Mr. Avram timely appealed the requests for constructive approval to the Land Court.[7] The Board filed cross-claims against Mr. Franklin which included claims that it was fraudulently induced to postpone its hearing beyond the 100-day period. Mr. Franklin also filed counterclaims against Mr. Avram. The Board convened on October 5, 2007 and voted to stay its proceedings pending a decision from the Land Court. Mr. Feinberg (the "Developer") purchased the property from Mr. Avram who filed a motion to substitute Mr. Feinberg as plaintiff in the matters. That motion was allowed by the Court. The two appeals have been consolidated and are pending.

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[6] The time to hear and decide this appeal, per the agreement dated June 22, 2006, expired on September 14, 2006. The Board sought an extension of time to hear this appeal, relying on Mr. Franklin's representation at the June 22, 2006 hearing that if the BBRS had not issued its decision by September 14, Mr. Franklin would request another extension. Mr. Franklin, however, refused to provide any extension.

[7] Those two cases have been consolidated as *Feinberg v. Gordon*, Misc. Case Nos. 329858 and 330594 (Land Court).

The Present Appeal

The Developer re-acquired the Property by deed dated November 6, 2006. The Developer sought to make changes to the design of the home and, after submitting a new plan to the Planning Board at a January 27, 2007 Planning Board hearing, obtained a new building permit, BL 07 00284, on March 14, 2007 (the "new building permit). Mr. Franklin timely appealed the issuance of this permit on April 12, 2007 (the "second permit appeal"). His appeal asserted the following six claims:

1. Notice of January 27, 2007 Planning Board hearing was defective because it did not adequately set forth the scope of the hearing. This defect voids the Planning Board approvals that went beyond the scope of the notice.
2. Issue preclusion and suspension of proceedings based on prior decision of the Board of Appeals.
3. Lack of authority of the planning board to approve plans. Lack of authority of the Planning Department staff to approve plans. Impermissible delegation of authority.
4. Malicious and vindictive acts by building officials void the issuance of building permit BL 07 00284.
5. Developer's architect's notarized letter certifying zoning compliance is redundant and immaterial.
6. Developers "Application for Plan Examination and Building Permit" Is False Requiring Revocation of Permit BL 07 00284.

A hearing on this matter was duly noticed for June 14, 2007. Shortly before the hearing, Mr. Franklin contacted the Board's counsel requesting a continuance. After consulting with the Board and counsel for the Developer, who had no opposition to a brief continuance, the Board agreed that the June 14th hearing would be conducted as a scheduling conference, provided that Mr. Franklin agree to extend the deadline for the Board to hear the case and issue its decision until November 30, 2007. Mr. Franklin and the Board signed the extension Agreement, a copy of which was filed with the Town Clerk on June 15, 2007.

On or about June 13, 2007, Mr. Franklin submitted a letter that more fully set forth his reasons for seeking a continuance. In his letter, he asserted that this appeal was essentially the same as the two prior appeals that were pending in Land Court, and that the Board should not hear this appeal until the Land Court had decided his two prior appeals. The Developer argued that the most orderly way to proceed was for the Board to hear the second permit appeal related to the 2007 building plans, and that this decision could then be appealed by either party and consolidated in Land Court with the earlier appeals based on the 2005 building plans. The Developer did not want to be in the position of having adjudicated the cases in the Land Court, and be left having to go through the appeals process again on the 2007 claims. The Developer stated that he could not sell the Property until all appeals had been resolved. The Board denied Mr.

Franklin's request and scheduled two full evenings of hearings on the matter (August 2nd and 6th, 2007).

On or about July 17, 2007, Mr. Franklin filed a Motion for Preliminary Injunction in the Land Court seeking to enjoin the Board from hearing the case or, in the alternative, enjoining the Board from considering those violations previously alleged by Franklin in the two prior appeals involving 135 Lagrange Street, and limiting the scope of any proceedings by making specific findings as to those changes in the "new" building plans filed in conjunction with BL 07 00284. The Board and the Developer opposed the motion and the Board submitted an opposition to staying the proceeding wherein it argued that the second permit appeal raised new issues and that it should be allowed to hear the appeal and determine the scope of it. The Board further argued that it may agree with Mr. Franklin that some issues are before the Land Court and will, on that basis, refrain from hearing them. Judge Lombardi heard arguments on the Motion on July 25, 2007.

Judge Lombardi issued an "Order Denying Motion for Preliminary Injunction" on July 30, 2007, finding that Franklin had failed to meet the standard for injunctive relief, and that it was not in the public interest for the court to stay the hearings. The Court stated that any person aggrieved by a decision of the Board could appeal the decision to the Land Court, and noted that such an appeal would seem an appropriate candidate for further consolidation with the pending actions in the Land Court.

The Hearing commenced on August 2, 2007. Mr. Franklin filed four preliminary motions. The Board granted Mr. Franklin's motion for a table so that he could adequately display plans and present his case, and his motion that the Building Commissioner be seated in a neutral location. Mr. Franklin also filed a motion to remove the Board's counsel, Associate Town Counsel John Buchheit, from the proceedings. Mr. Franklin argued that because Mr. Buchheit represents the Building Commission in another lawsuit brought by Mr. Franklin related to the development of 135 Lagrange Street[8], that he had a conflict in representing the Board and was engaged in misconduct in violation of Rule 8.4 of the Massachusetts Rules of Profession Conduct. The Board allowed Mr. Buchheit to respond to Mr. Franklin's motion. After noting the gravity of these allegations, Mr. Buchheit stated that he had researched the issue and consulted with the Office of Bar Counsel. It is his position and Bar Counsel's opinion that no conflict exists. He stated that his representation of the Board is not directly adverse to his representation of the Building Commissioner, and that his representation to one client is not materially limited by his responsibilities to the other; to a third person or to his own interests.[9] Mr. Franklin stated that Mr. Buchheit had missed the point of his motion. He

[8] As noted above, Mr. Franklin has filed a c.30A, §14 appeal to a decision of the Massachusetts Board of Building Regulation and Standards (the "BBRS"). The Town of Brookline has assigned Mr. Buchheit to represent the Building Commissioner in that proceeding.

[9] Mr. Buchheit further noted that the Rules of Professional Conduct, Comments to Rule 1.7, specifically acknowledge that "[t]he situation with respect to government lawyers is special, and public policy considerations may permit representation of conflicting interests in some circumstances where representation would be forbidden to a private lawyer." Rule 1.13, Organization As Client, and the Comments thereunder, further recognize the difficulties in applying the Rules to organizations. In order to

asserted that Mr. Buchheit's representation of the Board impugned the integrity of the proceeding. After brief deliberations and inquiring further of Mr. Franklin, the Board denied the motion.

The Board next considered Mr. Franklin's Motion to Suspend the Proceedings. Consistent with the Board's arguments in its Opposition to Mr. Franklin's Motion for Preliminary Injunction, the Chair noted at the outset of discussions that she agreed with Mr. Franklin that to have the Board decide specific issues that are before the Land Court is an exercise in futility and a waste of time. The Chair suggested that the hearing be limited to the building plans that were filed with the application for building permit BL 07 00284, because issues related to prior plans are before the Land Court. After a lengthy discussion between the Board, Mr. Franklin and the Developer as to the scope of the proceedings, Mr. Franklin suggested that rescinding the new permit (BL 07 00284) and designating the changes an amendment to the former permit, would obviate his appeal and the need for the hearing. The Board, interested in conferring with its counsel regarding this proposal, by role call vote and after announcing it would reconvene, went into executive session to discuss litigation strategy.

The Board reconvened and announced that it was in the best interest of all involved that the Land Court hear the case and to that end, the Board would recommend to the Building Commissioner that he change the building permit to a "transfer with amended plan." The Board agreed to make this recommendation only upon Mr. Franklin's agreement on the record to drop his allegation of malicious and vindictive acts by the Building Commissioner. The Developer, who under this plan would file an amendment to his Complaints in Land Court substituting the 2007 building plans for any earlier plans, was amenable to the solution. Mr. Franklin, after taking a break presumably to confer with attorney, suggested an alternative to his original suggestion. He stated would like to file a motion in the Land Court to reconsider his motion for preliminary injunction. The Developer would not agree to this suggestion and Mr. Franklin asserted he would not drop his allegations against the Building Commissioner, but that he should not need to do so. If the permit were re-designated, he would have no appeal and there would be no claim. After a lengthy discussion, wherein the parties and the Board failed to agree on the parameters of the resolution, the Board decided on the following course of action. It would ask the Building Commissioner if he would re-designate the building permit and then the Board would convey his decision to the parties, allowing them time to consider what they would do at the next hearing.

The Board reconvened on August 6, September 4, and September 11, 2007 to receive evidence and hear testimony. The proposed resolution of the case that became the focus of the August 2 hearing did not materialize. Mr. Franklin submitted a letter dated August 6, 2007 withdrawing his request to suspend the proceedings. Also, Mr. Franklin explained in his letter that, contrary to the position he had taken earlier in the proceedings (and before the Land Court), he now believed changing the designation of

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provide Mr. Buchheit with an additional defense should a complaint be filed with the Board of Bar Overseers, the Board also signed a waiver, acknowledging that a conflict could arise and consenting to Mr. Buchheit's concurrent representation of the Board and the Building Commissioner.

the permit would not moot his appeal. He now took the position that he was entitled to a hearing on all of the issues, regardless of whether they are before the Land Court and again objected to the Board limiting the scope of the hearing.

The Board, denying Mr. Franklin's request for a hearing on all of the issues, defined the scope of the hearing as follows: the hearing would pertain only to those zoning issues related to the 2007 plans and building permit; the Board would not hear claims regarding malicious or vindictive acts of the Building Department, because such claims were not within its jurisdiction; and, the Board would not hear claims regarding lapse of Special Permit, insufficient lot size or impermissible delegation of authority by the Board to the Planning Board because those claims were before the Land Court. Subsequently, the Board determined that because Town Counsel asserted in a cross claim in Land Court Misc. Case No. 329858 that Mr. Franklin had not properly raised the issue of infectious invalidity, he could proceed on that issue to cure any possible procedural defect.

In continuing to define the scope of the proceedings, the Board went through the six claims raised by Mr. Franklin in his papers and made the following determinations:

1. Notice of January 27, 2007 hearing was defective because it did not adequately set forth the scope of this hearing. This defect voids the Planning Board approvals that went beyond the scope of the notice.

   Board Determination – New claim properly before it.

2. Issue Preclusion and Suspension of Proceedings Based on Prior Decision of the Board of Appeals.

   Board Determination – Certain of Mr. Franklin's claims are properly before the Land Court and the Board will not consider these claims. Those claims that are related to the 2007 building plans and are not before the Land Court will be considered in this proceeding.

3. Lack of Authority of Planning Board to Approve Plans. Lack of Authority of Planning Department Staff to Approve Plans. Impermissible Delegation.

   Board Determination – Insofar as these claims relate to the 2007 building plans, they will be considered by the Board.

4. Malicious and Vindictive Acts by Building Officials Void the Issuance of Permit BL 07 00284.

   Board Determination – This claim is beyond jurisdiction of the Board and will not be heard.

5. Developer's Architect's Notarized Letter Certifying Zoning Compliance
Redundant and Immaterial.

Board Determination – Insofar as these claims relate to the 2007 building plans, they will be considered by the Board.

6. Developers "Application for Plan Examination and Building Permit" Is False Requiring Revocation of Permit BL 07 00284.

Board Determination – This claim alleges irregularities in the building permit application process, which is not a zoning issue within the Board's jurisdiction. The Board, therefore, will not hear this claim.

Mr. Franklin again objected to the Board limiting the scope of the proceeding in this manner.

Mr. Franklin began his presentation on his infectious invalidity claim. He reminded the Board that the lot was divided by an ANR (approval not required) plan and asserted that such an approval provides no standing under zoning. He explained that under the doctrine of infectious invalidity, if the division in any way made the 79 Princeton Road lot and the house upon it nonconforming, the Property would be infected with invalidity. Mr. Franklin argued that the 79 Princeton Road lot was left nonconforming in two respects. It has created a side yard setback violation and an FAR violation.

The alleged side yard violation was caused because the new lot line that divides the two lots is too close to the house at 79 Princeton Road. Mr. Franklin submitted a site plan dated April 28, 2005 in support of his argument, which showed a porch on the southern side of the home with the notation "to be raised." Mr. Franklin testified that the porch was razed in the year after the Special Permit was issued (April 14, 2004), but that a new even larger porch was built immediately after the porch was razed. Mr. Franklin estimated that the porch was two feet from the lot line.

According to Mr. Franklin, the Property was also infected by the creation of FAR violation. Mr. Franklin claims that the 79 Princeton Road structure exceeds the FAR because a large addition was put on the house and because of the failure, when calculating lot area, to deduct "water area more than 10 feet from the shoreline" pursuant Bylaw §2.12(6). Mr. Franklin testified that the water area was not properly depicted on the 2005 plans submitted to the Planning Board and the Building Department. He noted that he brought this to the attention of Town Engineer Peter Ditto in 2006 and that Mr. Ditto required the developer to submit a plan that showed the water area. Mr. Franklin submitted plans in supporting his position.

Mr. Franklin testified that by Mr. Ditto's informal calculations, the water area for 135 Lagrange was 420 square feet (s.f.), which would make the lot, which is 15,251 s.f.,

below the minimum lot size of 15,000 s.f. It was unclear whether Mr. Ditto's calculation was for the entire water area, or for that portion more than 10 feet from the shoreline. Mr. Franklin further testified that he hired an expert who identified the shoreline according to scientific principals. According the experts calculations, the water area, excluding the area 10 feet from the shoreline was 614 s.f. for the Property and 1,143 s.f. for the 79 Princeton Road lot, which was illustrated on a May 8, 2006 plan created by Verne T. Porter. Mr. Franklin then showed the Board a Sedimentation and Control Plan dated July 13, 2004 and prepared for the Developer by Everett M. Brooks Co., which was submitted because, according to Mr. Franklin, the Developer was bringing in "massive amounts of fill." This plan showed some water at the rear of the original 79 Princeton Road lot.

The Board agreed that there is water on both lots. It then turned its attention to the legal effect of the water. The Board's question was whether the water area and shoreline here are the type contemplated by §2.12(6) of the Zoning Bylaw. Mr. Franklin explained that he was making this presentation for his infectious invalidity argument, and not for his lot size argument, which the Board precluded him from doing. Mr. Walters, counsel for the developer, was given an opportunity to respond. Mr. Walters argued that because the issue of the size of the lot is before the Land Court, then the Board should not consider this issue, even in the context of the infectious invalidity argument, but instead should defer to the Land Court. With regard to the alleged setback violations, Mr. Walters deferred to the Building Department, but added that Bylaw §5.62 allows for stairs to extend into the setback.

Mr. Hitchcock, Senior Building Inspector for the Building Department, then addressed the Zoning Bylaw setback requirements. Mr. Hitchcock stated that there is no side-yard, rear yard or front yard setback violation at 79 Princeton Road. He stated that the porch was razed and replaced with an open sundeck that has no roof over it. According to the Bylaw §5.62, open sundecks are allowed to be one-half the setback that a building has to be, which means that the sundeck could come within seven and a half feet of the side lot line. The sundeck is more than 7.5 feet from the side lot line. Mr. Hitchcock further testified that the addition put on is two levels, but that the lower level is a three-car garage. He further testified that the attic is an attic, with the only access via a scuttle. One, therefore, needed a step ladder to access the attic. He further testified that the basement is just a basement. As for the water area, Mr. Hitchcock stated that there is an occasional body of water and how big it is depends on the weather and the seasons. He noted that when the Developer applied for the Special Permit, the topic of water came up. He represented that on two occasions, the Conservation Commission had made determinations that this was not the type of water to be concerned with. The Board of Appeals at the 2004 Special Permit hearing subsequently dismissed this as a "non-issue." That Board and the Building Commissioner relied upon the Conservation Commission as the authority on water.

The Board had further questions for Mr. Hitchcock. The plan showing the original division of property indicated that the southwest corner of the house is 12.50 feet from the newly created lot line. Mr. Hitchcock explained that where a lot line is not

parallel to a building line, the Zoning Bylaw §5.40 allows you to use an average, but the building cannot be closer than three quarters of the setback. Here 12.5 feet is less than three quarters of the 15 foot setback requirement. The Board then inquired about the porch. Mr. Hitchcock stated that porches are allowed to project 3.5 feet into the setback as long as they are not more than one half the length of the building wall. In fact, Zoning Bylaw §5.61 provides that porches which occupy not over one-third the length of the side wall may project into a required side yard not more than one-third of its width and not more than four feet in any case.

The Board then noted that the issue of the water area was squarely before the Land Court. Mr. Franklin in rebuttal emphatically denied that the issue of the water area came up in the 2004 Special Permit hearing. The Board notes, however, the following language from the Special Permit Decision:

> The Board finds that the proposed re-subdivision of the two lots, will and does meet the requirements of Section 5.15, finding that the re-plating of the two lots into conforming lots is not practicable as that would require that the construction of a new home on the Lagrange Street lot take place at the rear, below street grade, and in an area which has been subject to wetness.

Special Permit Decision, Board of Appeals Case No. 040006, page 5.

The Board then began deliberating on Mr. Franklin's infectious invalidity claim. The Chair expressed her position that when the lots were created in 2004 when the Special Permit was issued, the Board had to assume that the former Board made the determination that these were conforming lots. Furthermore, the chair believed that the moment to raise infectious invalidity was within 30 days of the issuance of the 1st building permit (August 25, 2005) if something were constructed that made 79 Princeton Road non-conforming. Accordingly, the chair believed that the issue was time-barred. Mr. Franklin argued that the Board was reading the former grant of Special Permit too expansively. The Board after further discussion voted unanimously that Mr. Franklin's infectious invalidity claims were time-barred.

The hearing was continued on September 4, 2007. Prior to the hearing, Mr. Franklin submitted a letter of the same date to the Board. In it Mr. Franklin stated that the Board would refuse to allow him to introduce any testimony or evidence on any issue raised in his appeal of the building permit at issue in this case. It seems, even though the Board spent hours explaining to Mr. Franklin its rulings regarding the scope of the proceeding, he did not understand it. Apparently, Mr. Franklin believed that he would only be allowed to present his infectious invalidity claim. This was, however, simply the first claim that the Board asked Mr. Franklin to present. The letter contains other characterizations of the proceedings that are not accurate. However, the hearing was transcribed and the Board believes that that record adequately portrays the hearing.

The aforementioned letter indicates that Mr. Franklin believed that at the September 4, 2007 hearing, he would be allowed to continue presenting evidence on his claim of infectious invalidity. The Board, however, having ruled that these claims were time-barred, did not allow him to continue. The Board again explained to Mr. Franklin that the 2007 building plans were squarely before it and that the Board had not foreclosed him from presenting his case thereon. Mr. Franklin stated that he absolutely did not remember it that way and he began, anew, debating the Board as to what the proper scope of the proceeding should be. The Board again explained to him its rulings on the scope, which was to limit the hearing to the 2007 building plans.

In the course of these discussions Mr. Franklin raised his allegation that the notice for the January 27, 2007 Planning Board hearing was defective because it did not adequately set forth the scope of this hearing. Mr. Franklin asserts that the notice stated the Planning Board would only consider exterior changes to the home and, in fact, the Developer presented for approval changes to interior floor plans. Mr. Franklin objected that the notice did not inform him that FAR would be a subject of the proceedings. In response, the Board explained that the Planning Board has no jurisdiction over FAR, and any decision it made regarding FAR was surplusage and the Board would pay no attention to it.

Mr. Franklin stated that he was not prepared to go forward with any other issues and asked the Board to continue the hearing. Mr. Walters, the attorney for the Developer, objected. To accommodate Mr. Franklin, however, the Board continued the case to September 11, 2007.

At the September 11, 2007 hearing, Mr. Franklin was represented by attorney Steven Bauman. Mr. Franklin, however, continued to present the majority of his case. The Board began the proceeding by again setting forth its ruling on the scope of the proceeding. Mr. Franklin again noted his exception to this, but stated that he had chosen to present on two issues within the scope set forth by the Board. These two issues were that the house at 135 Lagrange exceeded the height limit in the Zoning Bylaw, and that it violated the Zoning Bylaw's FAR requirement.

With regard to the building height, Mr. Franklin presented a letter containing the opinion of Verne T. Porter, a professional licensed surveyor. In the letter, Mr. Porter stated: "I certify that that the highest ridge of the house is 35.19 feet above the record grade at the midpoint of the lot." Mr. Franklin then argued at length that the Planning Board was given the authority by the Special Permit condition 2 to set the building height, and that the Planning Board did so for a building substantially less than 35 feet. His position is that after the first Planning Board hearing, its approval of the reduced building became the operative standard, and not the 35 foot standard set forth in the Zoning Bylaw. According to Mr. Franklin, what is built on the Property is a house that is 10 feet higher than that which was approved by the Planning Board at its May 19, 2005 hearing.

Mr. Franklin called his first witness, Architect Scott Payette, who created a building height diagram that was entered into evidence. The diagram shows the 135 Lagrange Street house as portrayed in the 2005 plan, as portrayed in the 2007 plan, and compares them to Mr. Franklin's home. The 2005 plan, according to Mr. Payette, showed a house that was 32' 8" above average grade. The 2007 plans show a house that is 34' 9" above record grade. Record grade is the grade at the mid-point of the frontage at street level. In this case, because the lot slopes down from the street, the record grade is higher than the average grade. Mr. Payette testified that the Zoning Bylaw allows a building height of 35 feet above record grade.

Mr. Payette then addressed FAR. By showing a wall section of the 2005 plan, Mr. Payette sought to demonstrate the Developer's intent to finish the basement. Mr. Payette referred the Board to Zoning Bylaw §2.04 1/2, which provides the definition of "Decommission." Mr. Payette argued that because you cannot decommission by removing finish, this space cannot be removed from the calculus of FAR. Mr. Payette then explained the diagrams he created to illustrate his calculation of FAR. At the basement level, he included the entire floor area, including the garage, but excepting a portion of floor area for mechanical space. This space is excluded from the calculation of "gross floor area" pursuant to Zoning Bylaw §2.07(1). Mr. Payette then stated that he included the garage because the parking requirements of the Zoning Bylaw can be satisfied outside of the building and therefore the garage cannot be excluded from the FAR computation. And, even if the garage is excluded, you still have too much floor area to satisfy the FAR requirements. Mr. Payette further testified that by calculating the floor area of the 1st and 2nd floors, there is no violation of the FAR requirements. Violations exist because, according to Mr. Payette, portions of the basement and the attic, or third level, must be included. In order to meet the FAR requirements, both the basement and the attic must be excluded from gross floor area.

Polly Selkoe presented on behalf of the Planning Department. With respect to height, she indicated that the architect had explained to the Planning Department that the building height had been generally consistent through all of the plans. With respect to FAR, Ms. Selkoe stated that she had worked with the committees that created the new definition of "decommission" in the Zoning Bylaw. According to Ms. Selkoe, the committee never contemplated a situation where the plans for a building that had never received a certificate of occupancy could not be changed to meet the requirements of the Zoning Bylaw.

Mr. Bauman provided his rebuttal. He argued that the definition of decommission referred to "existing building" and did not mention a certificate of occupancy. According to him, because the building was substantially completed in 2006, when the Developer submitted the 2007 plans and made the changes pursuant to the plans, he was effectively decommissioning space in violation of the Zoning Bylaw.

Mr. Walters, the attorney for the Developer, then presented his case. He stated that the attic and basement had not been constructed before the 2007 plans were approved. His point was that you cannot decommission an attic that you have not yet

built. As for building height, Mr. Walters stated that the April 28, 2005 plan presented to the Planning Board on May 19, 2005 was mislabeled "above average grade." Apparently, the architect had been doing work in the City of Newton, and that is what he used there. Mr. Walters stated that the building height has never changed. The Developer's architect has certified that the building is 34' 9". He stated that if it turns out that the measurement of Verne Porter (35.19') is accurate, then, although he believes the error is *de minimis*, the Developer would be able to correct the error.

The Board next heard from Frank Hitchcock of the Building Department. Mr. Hitchcock pointed out that in 2004 when the Board granted the Special Permit, it could have placed restrictions on the structure. It could have said, for example, that the structure must be 10 below the allowable building height or that the building can only be a portion of the allowable FAR. The Board did not do this. It only stated, in the 1st condition to the Special Permit, that the structure must conform to all dimensional zoning requirements. Mr. Hitchcock provided a letter from the architect certifying that the building complied with the height requirements. Mr. Hitchcock then opined that the additional .19' that Mr. Porter claimed was minimal and that suggested that Mr. Porter may have made a measuring error. Mr. Hitchcock then presented an as-built foundation plan submitted to the Building Department by a professional land surveyor. This survey, although dated June 20, 2006, also showed a building height of 34.75 feet. Mr. Hitchcock also noted that when the Developer applied for his permit in 2007, the building was just a shell and that no rough inspections of any kind had been performed.

The Board then asked Mr. Hitchcock about the attic. He testified that it was an attic and that due to vaulted ceilings being added to rooms on the second floor, much of what would have been the attic floor was gone. There were some flats floors in the attic. In this room there is exposed duct work, mechanical equipment and a plywood floor. He further testified that there is a stairway leading up to the attic, with a doorway closing off the stairway on the second floor. As for the basement, he testified that the basement has cement floors and cement walls and that some of it is used as a garage.

Mr. Gill Fishman of 79 Holland Road then spoke in support of Mr. Franklin. He opined that the Developer was engaged in illegal decommissioning. The Board then continued the hearing to September 27, 2007 for the limited purpose of hearing closing arguments from the parties and to deliberate. The Board asked the parties to arrange a site visit. The Board, the parties and their representatives visited the site on September 20, 2007 at 9:00 a.m.

At the September 27, 2007 hearing, Mr. Walters and Mr. Franklin were each allowed to submit an additional exhibit. Mr. Franklin submitted a Complaint filed by the former owners of the Property (Mr. Avram and Ms. Bamford) alleging that the architect who designed the building was negligent because the building exceeded the FAR. Mr. Walters presented a letter from an architect certifying the floor area under the 2007 plan. At this time, Mr. Franklin also conceded that his argument that the garage area had to be included in the calculation of FAR may have been overzealous and withdrew it. Mr. Walters presented the Developer's arguments first, which were confined to the 2007

building permit and the building plans submitted with the application for that permit. Mr. Walters addressed the issued of FAR and building height, and asserted that Mr. Franklin had not met his burden of proof. Mr. Franklin then argued. While providing a great deal of history and context, Mr. Franklin also confined his arguments to FAR and building height. His arguments were thorough and detailed. He described at length his observations made during the site visit.

The Board thus began its deliberations. Boardmember Shocket comments were as follows: He had listened to Mr. Franklin's presentation, visited the site and read the legal memo prepared by the Office of Town Counsel. He was one of the Board members who sat on the Spooner Road case, and, notwithstanding Mr. Franklin's assertions to the contrary, this is a completely different case. The Spooner Road construction had an attic that was two stories high and located on the second floor, the same level as the bedrooms in the home.

Mr. Shocket then commented on the observations he had made on the site visit. He believed the building in question has an attic and a basement and there is no basis to include any of it in the gross floor area calculations. The attic had devices protruding from the floor and was not habitable. The basement was just that, a basement. The fact that the developer changed his plans before the house was substantially completed to insure the building complied with FAR should not prejudice the Developer. Mr. Shocket then voted to deny Mr. Franklin's appeal of the Building Permit.

Boardmember Geller's comments were as follows: He recognized certain aspects of the history of this case raised significant concerns and that he understood Mr. Franklin's anger. However, these aspects of the case were not before the Board at this hearing. Mr. Geller noted that he did sit for the 1 Somerset Road hearing and that that case was significantly different from this one. In that case, a certificate of occupancy was issued and as soon as it was issued, the developer went ahead and finished out the space in question. In that case, the developer's malicious intention was clear. This case, notwithstanding its long history, does not rise to the level of the 1 Somerset Road case. Neither the attic nor the basement in this home is comparable in any way to what he observed at 1 Somerset Road. Mr. Geller stated that his interpretation of the Zoning Bylaw and, more specifically, his interpretation of the definitions of attic, basement and habitable space were not in accord with Mr. Franklin's interpretation.

Boardmember Starr provided the following comments: She stated that under Mr. Franklin's argument, every home in Brookline exceeds the FAR because every home has an attic and basement that could be turned into habitable space. The Board cannot consider "what-ifs." Ms. Starr looked for outlets in the attic and saw one next to the air conditioning unit. Although Mr. Franklin represented in his closing argument that there were more, Ms. Starr saw only one. She noted that the attic had severely sloped ceilings. The Zoning Bylaw requires that a space be habitable, which means finished out and compliant with the Building Code. To her eye, the stairway, stairwell, steps and doorway to the attic did not seem to comply. The fact that there was an air conditioning unit in the

attic did not raise a red flag. Ms Starr stated that to her, it was an attic, no more and no less. It met the zoning definition of attic and to the layman, looked like an attic.

With regard to the basement, Ms. Starr stated that because of the slope of the lot, by necessity the rear is at ground level. It is unfinished. She did not see outlets or heat ducts. She took the Developer at his word when he told her that the fire board was there to enclose the garage. As for Mr. Franklin's argument that the pipes were insulated, which meant they were going to finish the basement, her understanding is that if you do not insulate basement pipes leading from a furnace, you will get condensation. Ms. Starr's view is that the spaces in question are an attic and a basement and neither is habitable, and there is nothing that she could see to indicate that, in the foreseeable future, either would be finished. Ms. Starr did not accept Mr. Franklin's argument about decommissioning. This was not a building that was built out. It was still in the plan stage when the changes were made.

As for the height of the building, Ms. Starr understood Mr. Franklin's concerns with the changes, but did not accept that a building height presented to the Planning Board at the May 19, 2005 hearing became a condition of the Special Permit. The builders had the right to make modifications, which they did, and the height complied with the Zoning Bylaw. With reference to Mr. Avram's Complaint against the architect, it is not a verified Complaint and would not be legally binding as to the current developer, Mr. Feinberg, in any event. In closing, Ms. Starr stated that she finds that the attic is an attic, the basement is a basement and they are not habitable. Therefore, they should be excluded from the calculation of gross floor area. Ms. Starr believed that Mr. Franklin had misconstrued the holdings of the Spooner Road and Somerset Road cases. She thus voted to deny the appeal.

Unanimous Decision of
The Board of Appeals

Enid Starr, Chair

Date of filing: November 29, 2007

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Patrick J. Ward
Clerk, Board of Appeals